87-1253

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1987

DAVID CANSLER,
Petitioner,

vs.

GROVE MANUFACTURING COMPANY,
Respondent,

and

FIREMAN'S FUND INSURANCE COMPANY,
Intervenor.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED

Whether the Appellate Court assumed the role of the jury as a fact finder in this case, where there were obvious questions of fact, and therefore, effectively denied the petitioner his right to a jury trial as guaranteed by the Seventh Amendment.

STATEMENT OF CORPORATE AFFILIATION

Fireman's Fund Insurance Company is a California corporation. It is not a subsidiary of any other corporation.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Petitioner, David Cansler, respectfully prays that a Writ of Certiorari issue to review that judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-captioned matter, bearing Case No. 86-5588, on the 19th day of August, 1987.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit in Case No. 86-5588 is reproduced in the Appendix at pages A1 to A10.

The Memorandum Opinion of the United States District Court for the Eastern District of Tennessee in Case

No. Civ-2-84-210 by the Court on the 23rd day of May, 1986 after a hearing conducted on Defendant Grove's Motion for Judgment N.O.V. or For A New Trial is reproduced in the Appendix at pages A12 to A35.

The Judgment Entry of the United States District Court for the Eastern District of Tennessee in Case No. Civ-2-84-210 is reproduced in the Appendix at page A11.

Respondent's complaint was initially filed in the U. S. District Court for the Eastern District of Tennessee and is reproduced in the Appendix at page A37.

The Judgment of the United States Court of Appeals for the Sixth Circuit in Case No. 86-5588 Denying a Rehearing En Banc is reproduced in the Appendix at page A36.

JURISDICTION

The decision of the Sixth Circuit Court of Appeals was issued on August 19, 1987. Petitioner filed a timely Petition for Rehearing En Banc on September 9, 1987. The Petition for Rehearing En Banc was denied by the Court of Appeals in an Order entered October 14, 1987, which is reproduced in the Appendix at page A36. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. Constitution, Amendment VII

Trial by jury in civil cases.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by

jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This diversity case arises from on-the-job injuries received by petitioner from a falling jib that was improperly attached to the boom of a crane manufactured by respondent. The facts are set forth in detail in the thorough opinion of the trial judge, United States Magistrate Robert P. Murrian, denying the respondent's Motion for Judgment Notwithstanding the Verdict and Motion for a New Trial (Appendix at pages A12-A35).

Petitioner's contention was that the respondent failed to warn adequately of the danger of improper attachment, and failed to design the jib in such a way as to prevent operation of the crane in the event that the jib was not attached, or not properly attached, to the boom.

Petitioner presented expert testimony that the design of the boom and of the jib attachment was inadequate. The expert, Dr. Leighton Sissom, testified that the operator effectively can't see those pins when they're installed and that in this particular instance there was no way the operator could know, from his working position, whether the pins had been installed to safely stow this swingaway extension.

Dr. Sissom testified that there were a number of ways to remedy this which would not cost very much money. These included stowing the pins on the operator's side when not in use; the installation of a front mirror to enable the operator to see the position of the boom connector and jib stowage pins; and console lights and buzzers inside

the operator's cab that would have warned if the jib pins were removed before the boom connector pins were inserted. He further testified that an interlock system was available that would have prevented this accident, and that such a system has been around throughout his professional career, and that he had been practicing engineering for 24 years. Safety chains attached to the boom and jib could also have been used. The cost for these various systems would have been a very small cost.

The trial judge concluded (Appendix at page A17) that none of the warnings given in this case adequately alerted the user to the danger, namely, the risk of the boom extension or jib falling off and injuring someone. He found that a jury could determine that adequate warnings should have been placed on the machine itself, and that the decals that were in fact attached told the user nothing about the nature and extent of the danger involved. The Court of Appeals simply ignored these findings of fact, which were clearly in dispute, thereby obviously assuming the role of the jury.

On May 24, 1985, the petitioner filed suit in the United States District Court for the Eastern District of Tennessee (Copy of Complaint in the Appendix at page A37). After both parties agreed to the dismissal of all the petitioner's claims with prejudice except for the products liability claim anchored in strict liability as embodied in the Restatement (Second) of Torts §402A, the case was heard by jury before a U.S. Magistrate on February 2, 1986. The respondent moved for a directed verdict after the petitioner's case-in-chief and again at the close of all the evidence. Both motions were denied, and the jury awarded the petitioner one million dollars ($1,000,000) plus medical expenses, the total award amounting to one million,

sixty-five thousand eight hundred and seventy nine dollars and fourteen cents ($1,065,879.14). The respondent then moved for a judgment notwithstanding the verdict, for a new trial, and for remittitur of the jury's damage award. The magistrate denied all three motions. The respondent then commenced an appeal to the United States Court of Appeals for the Sixth Circuit arguing that the District Court erred in denying the respondent's motions for a directed verdict and for a judgment notwithstanding the verdict. On August 19, 1987, the United States Court of Appeals reversed the District Court's judgment in regard to a directed verdict and j.n.o.v. and remanded the case to the District Court for entry of judgment in favor of the respondent (Appendix at page A10). Petitioner filed a motion for rehearing en banc, which was denied by order of October 14, 1987 (Appendix at page A36).

REASONS FOR GRANTING THE WRIT

The United States Sixth Circuit Court of Appeals has blatantly deprived petitioner-appellant of his right to a trial by jury, as guaranteed in civil cases by the United States Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. *United States Const. Amend. VII.*

The United States Sixth Circuit Court of Appeals has also disregarded the Constitutional requirements of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), in this diversity of citizenship strict products liability case,

by refusing to follow the clear controlling law of the State of Tennessee.

In committing these Constitutional violations, the Sixth Circuit rendered its decision in this case in conflict with the decisions of other federal courts of appeals, it decided important federal questions under the Seventh Amendment of the United States Constitution and under *Erie v. Tompkins* in conflict with decisions of the Supreme Court of the State of Tennessee and in conflict with decisions of this Honorable Court, and it so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, pursuant to 28 U.S.C. § 1254.

I. THE APPELLATE COURT ERRED IN ASSUMING THE ROLE OF THE JURY AS A FACT FINDER IN THIS CASE, WHERE THERE WERE OBVIOUS QUESTIONS OF FACT AND THEREFORE, EFFECTIVELY DENIED THE PETITIONER HIS RIGHT TO A JURY TRIAL AS GUARANTEED BY THE SEVENTH AMENDMENT.

The right to a trial by jury is established under the Seventh Amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. *United States Const. Amend. VII.*

"This (the Seventh Amendment) requires that questions of fact in common law actions shall be settled

by a jury, and that the Court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. . ." *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 (1912).

The Court of Appeals, reversing the verdict and judgment of the trial court and dismissing this case, directed a verdict and found as a matter of law that there was no evidence to substantiate proximate cause even though the trial court and the jury found differently. This holding clearly usurped the Seventh Amendment Constitutional role of the jury as a fact finder in this case, where there were obvious questions of fact. The holding also disregarded the controlling law under *Erie*.

The Court in *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975) has summarized Tennessee standards in regard to directed verdicts as follows:

> It required the court to look to all the evidence, to take as true the evidence for the plaintiff, to discard all countervailing evidence, to take the strongest legitimate view of the evidence for the plaintiff, to allow all reasonable inferences from it in his favor; and if then there is any dispute as to any material determinative evidence, or any doubt as to the conclusion to be drawn from the whole evidence, the motion for a directed verdict must be denied.

In reversing the judgment of the district court and setting aside the verdict of the jury, the Court of Appeals stated:

> To satisfy his burden of proving proximate causation, Cansler was required to establish, at a minimum, that he would not have sustained his injuries had

> Grove installed available safety devices or provided additional warnings. (Appendix at page A9)

Circuit Judge Krupansky went on to conclude:

> Cansler failed to introduce *any* evidence which would have satisfied this burden. (emphasis added) (Appendix at page A9)

In the opinion of the petitioner, the Appellate Court has reweighed the evidence and discarded the testimony of petitioner's expert, Leighton Sissom:

> Q. What, what did you notice with respect to the presence or absence of safety devices on the crane which you inspected, which is the subject of this litigation?
>
> A. Well, in my opinion, it was devoid of a number of possible safety devices *that could have prevented this from happening.* (emphasis added)

Several pages of Dr. Sissom's testimony are devoted to a thorough discussion of safety devices which were feasible but not utilized by Grove which could have prevented this accident from happening.

Although this is not all the evidence in the record on this issue by any means, suffice to say that at least it does meet the Court of Appeals minimum standard as set out in the Court's opinion. Therefore, in viewing this evidence in a light most favorable to the petitioner, Cansler, Grove's motions for a directed verdict and for j.n.o.v. should have been denied and the Court of Appeals should not have set aside this jury verdict.

Petitioner also contends that the Court reweighed the points of fact on the issue of inadequate warnings or instructions. The Court's opinion states:

> Sissom, Cansler's expert engineering witness, testified that had Grove's instructions been followed and warnings been heeded, the boom extension could not have fallen and Cansler would not, therefore, have suffered an injury. (Court's Opinion, p. 8) (Appendix at page A9)

The instructions referred to in the Court's opinion are found in the "Operator and Safety Handbook" promulgated by the manufacturer of the crane. This handbook intermingles the warnings with instructions.

Dr. Sissom's testimony as directly quoted from the record is:

> Q. That gets back to my initial question then. Your opinions, as far as being able to see the pins, all of those assume that proper procedure is not followed in erecting this jib, the stowage pins are taken out too early, such that the jib can fall off. In other words, if this procedure had been followed, you wouldn't need any of the things that you talked about today because this actually wouldn't have happened, the jib couldn't have fallen off, isn't that correct?
>
> A. That is correct. –
>
> Q. Your opinion, again, all your opinions are based upon the assumption that the crane operator doesn't follow proper procedure in erecting the jib, nor is he familiar with the warnings or anything of that nature?
>
> A. My opinion is based upon the fact that the piece of equipment is not compatible with the words in the manual.

This quote clearly shows that Dr. Sissom did not state that had the instructions been followed the accident would have been prevented, but rather that the instructions themselves were inadequate.

Dr. Sissom's testimony is not based on whether the instructions were followed or not, but to the inadequacy of the warnings and instructions set forth by the manufacturer in the "Operator and Safety Handbook". His testimony evidences that the instructions and warnings themselves were not adequate.

In viewing the petitioner's evidence during the respondent's many motions, the trial court specifically found:

> The point is this, reasonable minds could have concluded that it was foreseeable by the defendant that laborers would be involved in removing and placing the connecting pins and that, unlike the crane operator, it was foreseeable that they would not have read the instruction manual and that the crane operator would not always be able to catch their mistakes. In any event, reasonable minds could certainly have differed regarding the adequacy of the warnings. (Magistrate's Memorandum Opinion, Appendix at page A18)

It is clear that the trial court recognized the inadequacy of the warnings and that the pins would be handled by others besides the crane operator and these other laborers such as Cansler would need adequate warnings of the dangers involved and that the instruction manual did not so adequately warn the crane operator or others such as Cansler handling the pins.

In viewing this evidence in a light most favorable to the petitioner, the petitioner has presented evidence that

inadequate warnings were the proximate cause of his injuries, and therefore, Grove is not entitled to a directed verdict or a j.n.o.v.

In the case at bar, in the preceding issues presented to the Court, the petitioner has given numerous but not exhaustive examples of evidence that was presented on behalf of the petitioner on the issue of proximate cause. In spite of this evidence, this Court has stated:

> There simply was *no* evidence presented from which reasonable minds could have concluded that Cansler's injuries were proximately caused by the alleged inadequate warnings and absent safety devices. (Court's Opinion, p. 8) (emphasis added) (Appendix at pages A9 to A10)

The evidence in this cause has been examined by the district court which concluded after an exhaustive memorandum opinion, that the district court's synopsis of the evidence supports his "view that the liability issues presented were for the trier of fact and that no miscarriage of justice occurred in the respect". (Magistrate's Memorandum Opinion, Appendix at page A30).

Obviously then, there was evidence from which reasonable minds could conclude that Cansler's injuries were proximately caused by Grove's inadequate warnings and/or absent safety devices.

The Appellate Court, by disregarding all petitioner's evidence in order to reach a different conclusion and set aside the jury's verdict has acted contrary to *Bruner v. Dunaway*, 684 F.2d 422, 425 (6th Cir. 1982) which includes the following quote:

> "[C]ourts are not free to reweigh the evidence and set aside the jury verdicts merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944); *Werthan Bag Corp. v. Agnew*, 202 F.2d 119, 122 (6th Cir. 1953).

Therefore, the Appellate Court denied the petitioner his right to a trial by jury, and the jury verdict in this cause has been improperly set aside and should be reinstated.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed August 19, 1987)

No. 86-5588

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID CANSLER,
Plaintiff-Appellee,

v.

GROVE MANUFACTURING COMPANY,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Before: ENGEL, KRUPANSKY, and GUY, *Circuit Judges.*

KRUPANSKY, *Circuit Judge.* Defendant-appellant Grove Manufacturing Company (Grove) appealed from the district court's order denying its motion for judgment notwithstanding the verdict or, in the alternative, a new trial following a jury verdict in favor of plaintiff-appellee David Cansler (Cansler) in this products liability action commenced under Tennessee law.

The record disclosed the following facts. In 1983, Cansler's employer, Greenville Erection and Excavating Company (Greenville), was awarded a contract to sandblast a steel structure in Sullivan County, Tennessee. To complete the work under the contract, Grove intended

to use a 1979 Grove TMS-300LP35 ton hydraulic truck (crane). Greenville had purchased the crane in "used" condition in the spring of 1983 and was provided with an "Operator and Safety Handbook" (handbook) detailing the operation and erection of the crane.

The "boom" of the crane was sufficient in length to accommodate most of the work performed by Greenville, but was, however, equipped with a 32 foot boom extension for use on occasions when a longer boom was required. When not in use, or in the "stowage position," the extension was stored alongside the boom and was held there by a "rear latch" and two "front support bracket" or "stowage" pins. To lengthen the boom, the extension was swung 180 degrees and locked in place for use. As described by the district court, the process was much like "unfolding a pocket knife which is lying on its side."

The process of erecting the extended boom was detailed in the "Operator and Safety Handbook" which contained the following definition in its preface:

> WARNING
>
> A WARNING IS USED TO EMPHASIZE THAT IF AN OPERATION, PROCEDURE OR PRACTICE IS NOT FOLLOWED EXACTLY, DEATH OR INJURY TO PERSONNEL MAY RESULT.

The handbook then set forth step-by-step instructions for unfolding the boom extension. The boom, with the extension affixed in the stowage position along its side, was swung to the rear and lowered to its minimum elevation. The handbook explicitly warned against the removal of the stowage pins at this point in time:

WARNING

DO NOT REMOVE THE PINS SECURING THE EXTENSION TO THE FRONT SUPPORT BRACKET AT THIS TIME.

In addition, adhesive stickers carrying the following message were affixed to the crane at each pin location:

CAUTION

ALL PINS MUST BE PROPERLY INSTALLED AND SECURED IN PLACE.

Thereafter, the rear latch was released, and the boom extension, using the front support bracket and pins as a pivot, was rotated slightly so that the attached fittings on the right side of the nose of the main portion of the boom and the fittings on the left side of the base of the extension were aligned. Two "attach pins" were then installed through the attach fittings securing the extension to the main section of the boom. The boom was raised to a horizontal position, and at that point, the front support bracket pins were removed. The extension, using the attached fittings previously secured by the attach pins as a hinge, was then swung around so that the boom and its extension were fully elongated. Two additional attach pins were installed completely securing the extension to the main section of the boom. After the hoist cables were rigged, the extended boom was ready for operation. Also affixed to the crane within its cab was a sticker setting forth abbreviated instructions on the proper erection of the boom extension.

On June 7, 1983, Greenville was prepared to utilize the crane to perform its work under the Shelby County sandblasting contract. Greenville determined that it

would be necessary to erect the boom extension for the project, and Cansler's supervisor therefore directed Cansler and several other laborers to assist the crane operator in doing so. The workers began the extension process, but one of the workers, whose identity is unknown, released the rear latch and removed the two front support bracket pins *before* the first two attach pins were installed. Consequently, the boom extension was totally unsecured by any pins, and it fell on Cansler when the operator began to raise the boom of the crane. Cansler suffered a fractured spine in the accident and was rendered a paraplegic.

Cansler commenced this action against Grove in the United States District Court for the Eastern District of Tennessee on May 24, 1985 seeking recovery under several different products liability theories. On December 10, 1985, Cansler and Grove stipulated to the dismissal of all his claims with prejudice except for his products liability claim anchored in strict liability as embodied in Restatement (Second) of Torts § 402A.[1] The parties there-

---

1. Restatement (Second) of Torts § 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

after consented to trial by jury before a United States Magistrate, and the trial commenced on February 26, 1986.

At trial, Cansler attempted to demonstrate that the crane was defective or unreasonably dangerous because the warnings concerning the dangers of erecting the boom extension were inadequate to apprise both himself and the crane operator of the nature and extent of the danger involved in erecting the boom extension, and because Grove failed to install safety devices which would have prevented the accident. Cansler testified that he had never read the crane operator's handbook and that it was never made available to him by Greenville. He did not testify, however, that the "caution" stickers affixed to the crane at each pin location were not clearly visible to him. Furthermore, he testified during his deposition that he was aware, as a matter of common knowledge, that if all pins were removed leaving the extension unsecured, it would fall. He further testified that he did not need to be warned of the danger of the extension falling because he was familiar with the crane and the danger involved in its preparation and operation.

Dr. Leighton Sissom (Sissom), Cansler's expert engineering witness, testified that if all instructions had been followed and all warnings been heeded, the accident would not have occurred. There was no evidence to the contrary. Sissom also testified that there were several "safety devices" available at the time the crane was manufactured which could have prevented the accident. These devices included a mirror situated so the crane operator could view the front support bracket and attach pins from his position in the cab of the crane, flashing lights or "buzzers" in the cab to warn the crane operator that the pins were not in place, and an "electronic interlock system"

which would have prevented the crane from being moved if the pins were not in place. Sissom stated, however, that the best method of preventing accidents such as the one which had occurred in the case at bar was for the crane operator to conduct a visual inspection of the pins before moving the crane or its boom. The crane operator's handbook directs the crane operator to follow this course of conduct.

Grove moved for a directed verdict at the close of Cansler's case-in-chief and again at the close of all the evidence. Both motions were denied. The jury returned a verdict in favor of Cansler and awarded him $1,000,000 plus his stipulated medical expenses, for a total award of $1,065,879.14. Thereafter, Grove moved for judgment notwithstanding the verdict, for a new trial, and for remittitur of the jury's damage award, all of which motions were denied by the magistrate. Grove then commenced this timely appeal arguing principally that the district court erred in denying its motions for a directed verdict and for j.n.o.v.

> On a motion for judgment n.o.v. as on a motion for a directed verdict, the district court must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury. The determination is one of law to be made in the first instance by the district court. The standard for measuring the legal sufficiency of the evidence is the same both on a motion for a directed verdict and on a motion for judgment n.o.v. Furthermore, the standard remains the same when the trial court's decision is reviewed on appeal.

O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975) (citations omitted). "A federal court sitting in a diversity

case must apply the directed verdict standard of the state whose substantive law governs the action." *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 269 (6th Cir. 1985). In Tennessee,

> [a] post-trial motion for the entry of judgment in accordance with a motion for a directed verdict made during the trial must be gauged by the usual rules relating to directed verdicts. Those rules require that the trial judge, and the appellate courts, take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be drawn from the whole evidence. A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion.

Holmes v. Wilson, 551 S.W.2d 682, 685 (Tenn. 1977) (citations omitted). Grove asserted that reasonable minds could draw but one conclusion from the evidence presented during the trial of this cause: that its crane was not defective or unreasonably dangerous within the meaning of those terms as employed in Restatement (Second) of Torts § 402A.

Under Tennessee law, a product may be considered defective or unreasonably dangerous if the manufacturer failed to incorporate safety devices, which were available at the time of the product's manufacture and which would have prevented an injury resulting from the use of the product. *Gann v. International Harvester Co. of Canada, Ltd.*, 712 S.W.2d 100 (Tenn. 1986). A product may also be considered defective or unreasonably dangerous if the

manufacturer failed to provide adequate warnings informing users of dangers involved in using the product. *Young v. Reliance Elec. Co.*, 584 S.W.2d 663, 668-69 (Tenn. App. 1979); *Gann v. International Harvester Co. of Canada, Ltd., supra.* "The warning should be such that if followed it would make the product safe for users," *Abbott v. American Honda Motor Co.*, 682 S.W.2d 206, 210 (Tenn. App. 1984), and it must be "calculated to bring home to a reasonably prudent user of the product the nature and extent of the danger involved in using the product." *Trimble v. Irwin*, 59 Tenn. App. 465, 441 S.W.2d 818, 822 (1968). "A product is not unreasonably dangerous because of failure to adequately warn of a danger or hazard that is apparent to the ordinary user." Tenn. Code Ann. § 29-28-105(d).

Under Tennessee law, however, a products liability plaintiff must always prove that the unreasonably dangerous or defective condition was the proximate cause of his injury. "The question then is: Is there material evidence in the record to show that the [product] was defective at the time it left the control of the defendants against whom recovery is sought, *and that the defective condition proximately caused the injury to plaintiffs.*" *Browder v. Pettigrew*, 541 S.W.2d 402, 405 (Tenn. 1976) (citations omitted) (emphasis added). "To establish the liability of the defendant, it was incumbent upon the plaintiffs to prove in addition that the defective condition . . . proximately caused the plaintiffs' injuries and damages . . . ." *Ricker v. Zinser Textilmaschinen GmbH*, 506 F.Supp. 3, 5 (E.D. Tenn. 1976).

After careful consideration of the record, this court determines that reasonable minds could not have concluded that the alleged unreasonably dangerous or defective conditions of the Grove crane were the proximate

cause of Cansler's injuries. To satisfy his burden of proving proximate causation, Cansler was required to establish, at a minimum, that he would not have sustained his injuries had Grove installed available safety devices or provided additional warnings. *See Wyatt v. Winnebago Indus.*, 566 S.W.2d 276, 280 (Tenn. App. 1977) ("[T]he circumstances must be such that the injury would not have occurred but for the defect."); *Jackson v. Tennessee Valley Auth.*, 413 F.Supp. 1050, 1055 (M.D. Tenn. 1976), *aff'd*, 595 F.2d 1120 (6th Cir. 1979) (per curiam). Cansler failed to introduce any evidence which would have satisfied this burden.

Sissom, Cansler's expert engineering witness testified that had Grove's instructions been followed and warnings been heeded, the boom extension could not have fallen and Cansler would not, therefore, have suffered an injury. Furthermore, Cansler testified that he was aware that the boom extension, if the front support bracket pins were removed, would fall and that it was therefore unnecessary to warn him of this danger. Cansler did not testify regarding the actions he would have taken if more "adequate" warnings had been provided. Although Cansler proceeded partially on a theory that the crane operator would not have begun to raise the unsecured boom had additional warnings been given or safety devices installed, he did not present the crane operator as a witness to testify concerning the events that led to the mishap. Furthermore, Sissom testified that a visual inspection of the pin locations by the crane operator prior to any movement of the crane, as recommended in the crane operator's handbook, was the safest way to prevent accidents. There simply was no evidence presented from which reasonable minds could have concluded that Cansler's injuries were

proximately caused by the alleged inadequate warnings and absent safety devices.

Accordingly, Grove was entitled to judgment as a matter of law in light of the absence of evidence establishing that the alleged defects in the crane were the proximate cause of Cansler's injuries, and the district court, therefore, erred in denying Grove's motions for a directed verdict and for j.n.o.v. The judgment of the district court is REVERSED, and the case is REMANDED to the district court for entry of judgment in favor of the defendant.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

(Filed December 4, 1987)

Case Number: CIV-2-84-210

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

DAVID CANSLER

v.

GROVE MANUFACTURING CO.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendant, Grove Manufacturing Co. and plaintiff shall take nothing from them.

KARL D. SAULPAW, JR.
Clerk
/s/ ELAINE MILLIGAN
(By) Deputy Clerk

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

(Filed May 23, 1986)

No. Civ-2-84-210

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

DAVID CANSLER,
Plaintiff,

v.

GROVE MANUFACTURING, INC.,
Defendant,

and

FIREMAN'S FUND INSURANCE CO.,
Intervenor.

MEMORANDUM OPINION

A jury returned a verdict in the plaintiff's favor in this action on February 28, 1986, and awarded him $1,065,879.14 in compensatory damages. This diversity action resulted from an injury plaintiff, David Cansler, received on June 7, 1983, when he suffered an on-the-job injury in Sullivan County, Tennessee. His employer, Greeneville Erection and Excavating Company, had a contract to sandblast a steel structure and was using a 1979 Grove TMS 300LP 35-ton hydraulic truck crane in doing the work. Just before the plaintiff was hurt

he was about six feet from the truck crane and standing under a 32 foot swingaway boom extension which he was helping rig. The boom extension is made so that it can be stowed alongside the boom and then swung 180° and locked in place for use. One might think of the process of erecting the swingaway boom extension as involving the same principle as unfolding a pocket knife which is lying on its side.

The swingaway boom extension is held in the stowed position by two front support bracket pins or "stowage pins" and a rear latch. When the swingaway boom extension is erected, two other pins are used to attach the boom nose and the swingaway boom extension. After the stowage pins are removed and the rear latch is released, the swingaway boom extension is moved 180° to its extended or "rigged" position.

In this case, the swingaway boom extension was not erected properly. Some unknown person removed the stowage pins and released the rear latch before the two pins at the boom nose were installed. This resulted in the swingaway boom extension being unfastened by any pins, and it fell on the plaintiff when it either vibrated loose or the crane operator moved the boom during the process of trying to erect the swingaway boom extension. Its approximate 2000 pound weight fractured plaintiff's mid-dorsal spine and rendered him a paraplegic.

This action was tried on the basis of one theory of recovery, *viz.* Restatement of Torts, Second, Section 402A. The plaintiff claims that the crane was defective and unreasonably dangerous when it left the defendant's control and reached the plaintiff in substantially the same condition. The plaintiff claims that the crane was defec-

tively designed, was not adequately tested or inspected and that defendant failed to provide adequate warnings or instructions for its use.

The defendant moves for judgment n.o.v., or alternatively for a new trial or for a remittitur.

I. *Motion for Judgment N.O.V.*

In connection with a motion for judgment n.o.v., the trial judge must determine whether there was sufficient evidence to raise a material fact for the jury. *O'Neill v. Kiledjian,* 511 F.2d 511, 513 (6th Cir. 1975). In doing so, the trial judge is required

> to look to all the evidence, to take as true the evidence for the plaintiff, to discard all countervailing evidence, to take the strongest legitimate view of the evidence for the plaintiff, to allow all reasonable inferences from it in his favor; and if then there is any dispute as to any material determinative evidence, or any doubt as to the conclusion to be drawn from the whole evidence, the motion for a directed verdict must be denied.

Id., quoting *Poe v. Atlantic Coast Line Railroad Co.,* 205 Tenn. 276, 284, 326 S.W.2d 461, 464 (1958).

In support of the motion for judgment n.o.v., the defendant raises these grounds:

(1) the plaintiff was actually aware of the danger of the jib falling if left unattached;

(2) this was an obvious danger for which the law imposes no duty to warn;

(3) the actual instructions, warnings and cautions given were adequate as a matter of law;

(4) if Grove's instructions, warnings, and cautions had been heeded the product was safe and plaintiff's accident would not have occurred;

(5) no evidence was introduced that inadequate testing caused Grove's crane to be defective or unreasonably dangerous, nor that inadequate testing caused or contributed to plaintiff's accident;

(6) no proof was introduced to support proximate causation between inadequate warnings and/or instructions, testing and design defects and plaintiff's accident;

(7) no proof was introduced to contradict Grove Crane complied with the state of the art; and

(8) plaintiff's failure to call the actual crane operator as a witness to show how he would or might have acted differently or how the accident would or might have been prevented, had the proposed additional warnings, testing or safety devices been present, precluded plaintiff from making a prima facie case.

A.

Adequacy of Warnings/Instructions

In order to prevent a product from being unreasonably dangerous, the seller may be required to give adequate instructions for the product's use and/or to give a warning as to the possible dangers involved in the product's use. Where such directions or warnings are required to be given, the failure to give them may make the product defective and unreasonably dangerous so as to render the seller liable.

Where an intended use of a product involves a danger which is not generally known, the seller is required to give a warning as to such use, if he has knowledge, or if by the application of reasonable human skill and foresight he should have knowledge of the danger involved. However, there is no duty to warn and a product is not unreasonably dangerous because of a failure to adequately warn of a danger or hazard that is apparent to the ordinary user. T.C.A. § 29-28-105(d).

Where a duty to warn or give instructions for use exists, the warning or instructions given must be adequate. A warning or instruction is considered adequate when it is calculated to bring home to a reasonably prudent user of the product the nature and extent of the danger involved. *Young v. Reliance Elec. Co.*, 584 S.W.2d 663, 668 (Tenn. App. 1979), *cert. denied, id.* The warning should be such that if followed it would make the product safe for users. *Abbott v. American Honda Motor Co., Inc.*, 682 S.W.2d 206, 210 (Tenn. App. 1984), *cert. denied, id.*

It was stipulated in this case that, at all times material, the plaintiff's employer had possession of an operator's manual for the crane in question. Pages 7-3 through 7-7 of that manual contain instructions for erecting the swing-away boom extension. Ex. 19. Interspersed in those instructions are two sentences entitled "warning" and one entitled "caution." The most important "warning" for the purposes of this lawsuit is inserted after Step 4 and it states:

> Do not remove the pins securing the extension to the front support bracket at this time.

This alerts the user to the fact that the pins at the nose of the boom are not yet installed. Of course, this is precisely the error that was made when the plaintiff was injured.

There was a decal on the crane itself which gave abbreviated instructions regarding how the swingaway boom extension was to be erected. Ex. 35. The machine also had caution decals on it which stated: "CAUTION all pins must be properly installed and secured in place." Ex. 35, 37.

Dr. Leighton E. Sissom, the plaintiff's engineering expert witness, testified on cross-examination that he had "no problem" with the instructions that were given and that if they had been followed, the accident would not have occurred. There was no evidence to the contrary.

Under these circumstances was there a jury question regarding any failure to provide instructions or warn? I believe so. In my opinion, a jury question was presented regarding whether or not the instructions or warnings were adequate under the circumstances.

The rule on the subject is fairly straight-forward: "An adequate warning is one calculated to bring home to a reasonably prudent user of the product the *nature and extent of the danger* involved in using the product." *Trimble v. Irwin*, 441 S.W.2d 818, 822 (Tenn. App. 1968), *cert. denied, id.* (1969) (emphasis added).

The warnings given in the instruction manual and the caution label on the machine itself do not set out the nature and extent of the danger involved. The defendant's rejoinder to that is that the nature and extent of the danger were obvious to the ordinary user. I will deal with that in Part I.C. below.

When the swingaway boom extension is erected laborers are involved in the process. The patent on the swingaway boom extension states that the only tool required for erecting it is a hammer "for tapping home the connecting pins which anchor the base of the jib to the boom nose assembly when the jib is erected." Ex. 18. The plaintiff's testimony and that of the foreman on the job, James Gorman, make it clear that laborers like plaintiff were involved in erecting the boom extension. From the crane operator's position it is very difficult to tell which connecting pins are or are not in place. The point is this, reasonable minds could have concluded that it was foreseeable by the defendant that laborers would be involved in removing and placing the connecting pins and that, unlike the crane operator, it was foreseeable that they would not have read the instruction manual and that the crane operator would not always be able to catch their mistakes. In any event, reasonable minds could certainly have differed regarding the adequacy of the warnings.

It is important to keep in mind the difference between an instruction and a warning. "Directions [or instructions] tell how to use the product efficiently while warnings tell the dangers involved." *Helene Curtis v. Pruitt*, 385 F.2d 841, 860 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968). A manufacturer can give adequate instructions with a product but nonetheless be held liable for failure to warn.

> Warnings, on the one hand, and directions or instructions on the other, are not necessarily the same. While both have the common purpose of protecting the public, there is a distinction between them, which relates to their functions. *Warnings tell of the dan-*

> *gers involved,* while directions or instructions tell how to use the product efficiently or effectively, and how to avoid danger. *Directions for the use of a product, no matter how clearly presented, cannot satisfy the duty to warn, and will not discharge the duty to warn where they fail to alert the user to the danger they seek to avert.*

72 C.J.S. Supp. *Products Liability* § 25, pp. 39-40 (1975) (footnotes omitted); *see also Abbott v. American Honda Motor Co.*, 682 S.W.2d 206, 210-211 (Tenn. App. 1984), *cert. denied, id.*

None of the warnings given in this case alerted the user to the danger they sought to avert, *viz.* the boom extension falling off and injuring someone. Reasonable minds could have concluded that an adequate warning required something to this effect:

> WARNING
>
> DO NOT REMOVE THE PINS SECURING THE EXTENSION TO THE FRONT SUPPORT BRACKET AT THIS TIME. THE SWINGAWAY BOOM EXTENSION COULD FALL AND CAUSE INJURY OR DAMAGE IF THESE PINS ARE REMOVED AT THIS TIME.

Furthermore, reasonable minds could have concluded that the warning should have been on the product itself where foreseeable users like the plaintiff and his co-workers could see it. Lastly, reasonable minds could have concluded that the "Caution" decals on the machine were inadequate. The words "all pins must be properly installed and secured in place" tell users nothing about the nature and extent of the danger involved and do

not convey the idea of "danger" in the sense of possible personal injury or property damage.

The defendant cites the case of *Reeves v. Power Tools, Inc.*, 474 F.2d 375 (6th Cir. 1973), in support of its assertion that the instructions and warnings were adequate as a matter of law. In that case, the Court held that the manufacturer of a gunpowder-activated tool was not liable for failure to warn and instruct, as a matter of law, because it had distributed "printed instructions complete with diagrams and illustrations with each new tool it had sold or delivered." 474 F.2d at 379. This was an alternate holding. The Court had first determined that the plaintiff had not shown that the tool was defective when it left the manufacturer's control. *Id.* The product injured plaintiff after it misfired.

In the present case, the jury was charged without objection that plaintiff was a user or consumer of the product when the accident occurred. Unlike the situation in *Reeves*, Mr. Cansler was not operating the product *per se*. There was a crane operator who was charged with overall operation and safety of the crane. However, it was foreseeable that laborers or riggers like the plaintiff would be around the crane and would actively participate in the swingaway boom erection process.

In *Reeves*, it may have been reasonable to charge the operator of the product with knowledge of the manufacturer's instructions for use of the product as a matter of law. But, in the present case, it was not the operator of the crane who was injured; rather, it was a reasonably foreseeable user of the product who was injured. The warnings and instructions which defendant gave were required to be reasonably "calculated to bring home to

a reasonably prudent user of the product the nature and extent of the danger involved in using the product." *Trimble,* 441 S.W.2d at 822.

In *Reeves,* the trial court held that the manufacturer had given proper instructions regarding what to do if a misfire occurred and that "it had a right to expect the warnings to be passed along to the ultimate consumer." 474 F.2d at 379. This was affirmed. The present case does not involve failure to pass warnings or instructions along for the benefit of the ultimate consumer; rather it involves the adequacy of warnings or instructions that were available to the ultimate consumer. Normally, the question of the adequacy of instructions or warnings is a question for the jury. *Young v. Reliance Elec. Co.,* 584 S.W.2d 663, 669 (Tenn. App.), *cert. denied, id.* (1979). This case comes within the normal rule.

B.

Causation

The defendant insists that no proof was introduced to support a finding of causation between any inadequate warnings and/or instructions, testing and design defects and the plaintiff's accident. The issue of proximate cause ". . . is one for the jury to decide, unless the uncontroverted facts and the inferences to be drawn from them make it so clear that all reasonable men must agree on the outcome." *Wyatt v. Winnebago Industries,* 566 S.W.2d 276, 281 (Tenn. App. 1977), *cert. denied, id.* (1978).

If the finder of fact determines that a product is unreasonably unsafe,

> . . . then the failure of the *plaintiff or his employer* to heed the instructions or warning do not as a matter

> of proximate cause interrupt the defendant's liability, unless of course it may be said the plaintiff has assumed the risk. . . . In order for the fact finder to determine that plaintiff assumed the risk he must find that plaintiff voluntarily and unreasonably encountered a known danger.

Young, 584 S.W.2d at 669 (emphasis added). The question of voluntary assumption of the risk was put to the jury in the instant case and it rejected that defense. Whether any failure to warn or instruct caused plaintiff's injury was a jury question.

There was a dispute regarding whether or not the design of the crane rendered it defective or unreasonably dangerous. Dr. Sissom, plaintiff's engineering expert, opined that the design was defective because the operator had difficulty knowing whether or not the pins which support the swingaway boom extension were in place or not. He suggested several ways in which this could have been rectified, *e.g.,* stowing pins in a different place, use of mirrors to keep track of the pins, electrical interlocks, light in console in operator's cab. Whether defective design was a substantial factor in causing the plaintiff's injury was also a question for the jury.

Evidence regarding testing of the product was introduced by plaintiff in the form of Eugene Gardenhour's deposition. He is Grove's senior Vice President of Engineering. An excerpt of his testimony follows:

* * * * *

> Q. Was there any testing that you can refer me to that was conducted with reference to the design of this product and the possibility of it falling;

that is, the jib falling, prior to putting it on the market?

A. The only testing that would have been done would have been, originally, at our research and development test area and the jib would have been erected by our mechanics and stowed. It's always done by our Quality personnel during tests. It's certainly done by our Manufacturing people to check out the alignment. Every machine is checked or tested at least once before it leaves the factory.

Q. Mr. Gardenhour, was there any testing done for the purpose of determining from a human factor standpoint the likelyhood [sic] of these pins being left out to where the jib might fall?

A. Not that I'm aware of.

Q. Was there any consideration given in the design and subsequent manufacture of the product of a possible failure; that is, the jib falling as a result of the pins being left out?

A. Not that I'm aware of.

* * * * *

Deposition, p.24.

The plaintiff also read from the deposition of David Perry, defendant's Manager of Product Safety and Reliability, who also described the testing that Grove did. Deposition, p.16-17.

In my opinion the adequacy of the testing which was done and whether any failure to test adequately was a substantial factor in causing the plaintiff's injury were

questions for the jury. Not much time and attention was devoted to the failure to test question at trial but reasonable minds could have differed regarding that question. In any event, that theory was not specifically charged to the jury in the final instructions and so I do not understand how the defendant could have been prejudiced.

The jury was charged without objection regarding the doctrine of intervening cause.

The fact that the boom extension was slightly bent before this accident and that plaintiff's employer had been warned not to use it had nothing to do with this accident. The bending affected the boom extension's ability to bear heavy loads but had absolutely nothing to do with it falling off the machine and hitting the plaintiff. The extension can be rigged and unrigged without difficulty even though bent. Even the defendant's expert would not draw any connection between the bent boom extension and the accident. Pursuit of this contention further is just a "wild goose chase."

C.

Obviousness of the Danger

A product is not unreasonably dangerous because of failure to adequately warn of the danger or hazard that is apparent to the ordinary user. T.C.A. § 29-28-105. Obviousness of a danger is a factor which should be considered in connection with determining whether or not the plaintiff voluntarily assumed the risk of his injuries and also whether the risk or danger was unreasonably dangerout, *i.e.*, whether the product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer with ordinary knowledge common to the com-

munity as to its characteristics. *Miller v. Utica Mill Specialty Machinery Co., Inc.*, 731 F.2d 305, 308 (6th Cir. 1984).

In *Orfield v. International Harvester Co.*, 535 F.2d 959 (6th Cir. 1976), the Court held that although a bulldozer was dangerous to operate without a canopy guard, it was not dangerous to an extent beyond the knowledge of the operator as an ordinary consumer. But there the undisputed evidence revealed that plaintiff had full knowledge of the machine's characteristics as manufactured and delivered and he was fully aware of the danger presented by operating the bulldozer in a windrowing operation without a canopy guard.

In a footnote that has significance in this case, the Court stated:

> Since in this case the facts are undisputed that the plaintiff actually contemplated the danger, it is not necessary to speculate how the Supreme Court of Tennessee would apply Sec. 402A in the case of mere obviousness. Ordinarily, whether a defect is an obvious one would present a question for the fact finder. *We would assume, although we do not decide, that the Tennessee court would probably hold that obviousness should be considered by the fact finder along with all other relevant facts in determining whether or not the plaintiff contemplated that a given defect would be unreasonably dangerous as to him.*

535 F.2d at 964 n.6 (emphasis added).

In the present case, the facts revealed that plaintiff was a 21-year old high school graduate who was earning $4.00 per hour as a laborer when the accident occurred. He had never worked on the crane itself but may have been

near it when the boom extension was rigged on other occasions. He was standing about 6 feet from the machine preparing to help swing it 180° to its extended position when the swingaway boom extension fell on him. He had never seen the swingaway boom extension fall. He did not remove the stowage pins and he does not know who did. He did not know the exact mechanism by which the swingaway extension was mounted to the crane before it was swung into place. The jury could have reasonably concluded that the plaintiff had no reason to know he was in dangerous situation or that, even if he should have known that he was, he was guilty of contributory negligence at most.

James Gorman, the foreman on the job, testified that he did not know who pulled the pins out which allowed the swingaway extension to fall. He left the immediate area to get his hard hat and after he returned the accident happened. He said that there was nothing to warn a laborer like plaintiff that the boom extension could fall and that laborers like the plaintiff would have no reason to read the operator's manual.

The plaintiff testified in a deposition that he knew that if there were no pins inserted at the front support bracket (also referred to as "stowage pins") and that if no pins were inserted at the boom head, the boom extension would fall. But, the jury may have felt that plaintiff was doing nothing more in this testimony than acknowledging the law of gravity.

Unlike the situation in *Orfield*, Mr. Cansler did not have full knowledge of the crane's characteristics as manufactured and delivered and he was not fully aware of the danger which would be incurred in standing where he did before the accident. Mr. Gorman said that he was

under the boom extension while it was unpinned and before it fell. He was the foreman on the job. The boom extension did not fall immediately after the pins at the front support bracket were removed. If the plaintiff had been injured after he stood and watched someone remove the pins, an altogether different situation would be presented. The extension fell after the boom extension vibrated loose or the crane operator moved the boom. Exhibit 6 shows the view one would have of the extension in its proper stowed position. If one mentally pulls the two pins out, reasonable minds could certainly differ regarding whether the danger would be obvious to a laborer working around the crane. Therefore, a situation was created which reasonable minds could conclude was danerous to an extent beyond that contemplated by an ordinary user of the product with the ordinary knowledge common to the community as to its characteristics.

D.

State of the Art

Tennessee has created a statutory affirmative defense based on a product's compliance with the state of the art. T.C.A. § 29-28-105(a) and (b); Frumer & Friedman, *Products Liability* §16A [4] [i], p.3B-176.4 (1985). Unlike compliance with government standards, no rebuttable presumption is created if a defendant shows that his product was manufactured in accordance with the state of the scientific and technological knowledge available to the manufacturer when the product was placed on the market. It is simply an affirmative defense which a defendant must prove.

The defendant may be confusing compliance with "industry standards" with conformity to the state of the

art. The two are very different. Frumer & Friedman, p. 3B-176.3.

> [I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. . . . [t]here are precautions so imperative that even their universal disregard will not excuse their omission.

The T. J. Hooper, 60 F.2d 737, 740 (1932). And so, the defendant cannot rest on the assertion that it was building truck cranes in 1979 just like the rest of the industry was. "Consideration" must be given to that assertion but it is not conclusive. *See* T.C.A. § 29-28-105(b). Dr. Sissom testified that certain technology was available when this crane was built which would have made it a better design, *e.g.* use of mirrors to view locking pin placement, electrical interlocks, warning lights. A jury question was presented.

The defendant raised the state of the art defense, it was charged, and the jury obviously rejected it. Reasonable minds could certainly differ about it.

E.

Failure to Call the Crane Operator as a Witness

There is no indication that this prospective witness was or is under plaintiff's control or that he would not have been just as available to the defendant as to the plaintiff. The questions of defect, causation (including intervening cause) and damages were all properly presented to the jury. It was no defense in this action that someone was contributorily negligent in connection with

the accident. The crane operator may have been contribuorily negligent but that is irrelevant in a §402A case. Furthermore, a danger or hazard must be obvious to an ordinary user before no warning is required. T.C.A. § 29-28-105. This contention lacks merit.

II. *Motion for New Trial*

The defendant contends that the undersigned should grant a new trial on the ground that the verdict is against the clear weight of the evidence. *See Bruner v. Dunaway,* 684 F.2d 422, 425 (6th Cir. 1982), *cert. denied,* 103 S.Ct. 816 (1983). A trial court should not interfere with a verdict unless it is quite clear that the jury has reached a seriously erroneous result. Wright & Miller, *Federal Practice and Procedure: Civil* § 2806 (1973).

> It may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions of this type. Necessarily all such formulations are couched in broad and general terms that furnish no unerring litmus for a particular case. On the one hand, the trial judge does not sit to approve miscarriages of justice. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all that the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Wright, *The Law of Federal Courts* §95, p. 635 (4th ed. 1983).

I am not so convinced and therefore a new trial will not be granted. What is set out above in Part I supports my view that the liability issues presented were for the trier of fact and that no miscarriage of justice occurred in that respect.

III. *Remittitur*

If a presiding judicial officer considers a verdict excessive, he need not grant a new trial but may deny it on condition that the plaintiff consent to a remittitur of the excess. *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296 (1935); 11 Wright & Miller, *Federal Practice and Procedure: Civil* § 2815.

Granting a remittitur is a matter of discretion with the presiding judicial officer and an abuse of that discretion will only be found where the quantum of damages found by the jury was clearly within the maximum limit of a reasonable range. *Smith v. John Swafford Furniture Co.*, 614 F.2d 552, 553 (6th Cir. 1980).

A trial judge may not just substitute his judgment for the collective judgment of a jury.

> It would be a usurpation of judicial authority, in the absence of any showing of bias, prejudice, passion, corruption or caprice upon the part of the jury where there is in the record substantial evidence to support the amount awarded by a jury as damages to the plaintiff, should the trial judge presume to set aside the verdict, or to reduce it, merely because the judge, himself, would not have awarded so large an amount had the case been tried to him without

> a jury. . . . "Courts in general are reluctant to disturb a jury's verdict on the ground of excessiveness where the damages are unliquidated and there is no fixed measure of mathematical certainty. . . . This is particularly significant with respect to damages in tort actions for personal injuries."

Werthan Bag Corp. v. Agnew, 202 F.2d 119, 122-123 (6th Cir. 1953) (citations omitted).

"The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law." *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 97 S.Ct. 835, 837 (1977). Nonetheless, I see no reason not to look at Tennessee law for guidance.

> All will agree that the determination of excessiveness or inadequacy [of a verdict] is generally easier in a condemnation case than in personal injury and wrongful death cases, but all result in money judgments and excessiveness or inadequacy can only be determined by a reasoned examination of the probative value of the credible proof of damages.

Ellis v. White Freightliner Corp., 603 S.W.2d 125, 127 (Tenn. 1980).

The plaintiff received grave injuries in the accident. He is a paraplegic. His paralysis extends from mid chest to his toes. His bladder must be catheterized at all times and he is subject to involuntary bowel movements. He must remove his solid waste manually. He can drive a specially modified automobile and he has learned to bathe himself, groom himself, clean himself, get dressed, make simple meals, and get out of the house when he

wants to. He is confined to a wheel chair when he is out of bed. In all likelihood, he will never be able to father children.

His broken back has been surgically reinforced with two steel rods. He suffers muscle spasms from time to time. He will be on medication for the rest of his life, including a drug which suppresses muscle spasms in the lower extremities and a drug which is used to fight urinary tract infections. He will suffer pain for the rest of his life from time to time as the result of his injury. He is apt to suffer from skin sores and bladder infections from time to time for the rest of his life. He will require medical treatment from time to time for the rest of his life.

David Cansler was a healthy, active, energetic 21-year-old when he was injured. At the time of trial he had a life expectancy of 63.2 years and a work life expectancy of 42 years. If one uses the $4.00 per hour he was earning as a constant rate of pay over 42 years, he would have earned about $350,000 during his working life. Of course, that sum's present value would be much less. It is certainly foreseeable that his rate of pay would have increased over the years but inflation would likely take its toll. He works part-time at present assembling small components in his home. He may be able to obtain further employment in the future.

In *Gaston v. Aquaslide N' Dive Corp.*, 487 F.Supp. 16 (E.D. Tenn. 1980), Judge Robert L. Taylor reduced a $1,250,000 verdict to $1,000,000 in a products liability case involving a plaintiff who was rendered a quadriplegic as the result of a defective product. I have not been able to locate any reported Tennessee cases dealing

with allegedly excessive verdicts in cases involving paraplegia.

In *Garcia v. The City of South Tucson*, 131 Ariz. 315, 640 P.2d 1117 (Ct. App. Ariz. 1981), *review denied, id.* (1982), the jury awarded plaintiff $3,592,213 for injuries he received as the result of defendant's negligence. The plaintiff had been shot in the back and rendered a paraplegic. The Court affirmed the trial judge's refusal to reduce the verdict stating: "As a result of his injury, Garcia is a paraplegic, is in chronic, constant pain, suffers from incontinence, impotency, physical dependence, and carries the psychological scars caused by this disaster. The verdict is not excessive." 640 P.2d at 1122.

The instant case is somewhat different in that Mr. Cansler does not suffer chronic, constant pain. Also, he has become virtually self-sufficient in caring for himself by virtue of a lot of determination and effort during the rehabilitation process.

In *Poulos v. City of New York*, 99 A.D.2d 709, 472 N.Y.S.2d 3 (1984), the plaintiff, a 16-year-old boy, was grievously injured when his motorcycle was struck by an ambulance owned and operated by the defendant. Plaintiff was rendered a paraplegic as the result of the accident. The jury awarded him $5,000,000 in damages. The Court ordered a remittitur to $3,750,000, $1,000,000 of which was for pain and suffering, $2,100,000 for future medical and related expenses, and $650,000 for future loss of earnings.

The instant case is somewhat different in that loss of future earnings was not shown to have been as great and future medical and related expenses were not provable with any degree of certainty.

In *Bassett Furniture Industries, Inc. v. McReynolds,* 216 Va. 897, 224 S.E.2d 323 (1976), the appellate court held that the trial judge did not abuse his discretion in ordering a $450,000 remittitur from a $1,000,000 verdict brought by a workman who suffered injuries which rendered him paraplegic when he fell through a hole in a floor at a construction site. The plaintiff proved $20,382 in accrued medical expenses but, like the present case, future medical expenses were not provable with any degree of certainty. 224 S.E.2d at 331. The plaintiff had a wage history of $7,000 per annum and had a work expectancy of 32 years. He was 33 years old at the time of his injury and had a 10th grade education. He was in good health before the injury except for an ulcer.

But, the *McReynolds* case is ten years old. The value of a dollar is less today. Also, the plaintiff in the instant case was twelve years younger than the plaintiff in *McReynolds* when the injury occurred.

In the present case, the elements of the plaintiff's damages were losses due to (1) permanent injury, (2) pain and mental anguish, (3) lost wages, (4) reduction in his ability to enjoy life, (5) medical expenses and future medical expenses, and (6) reduction in his ability to earn a living in the future. It was stipulated at the time of trial that plaintiff had incurred $65,879.14 in medical expenses at the time of trial.

In my opinion, $1,065,879.14 is within the range of reasonable compensation in this case. It is recognized that, for example, five hundred thousand dollars invested at 8% per annum would yield an annual income to plaintiff of $40,000 without touching the principal. *See Gaston,* 487 F.Supp. at 18. His annual gross income when he was

injured (figured at $4.00 per hour for a forty-hour week) was $8,320.00. His future medical and related expenses are not estimable with any degree of accuracy at this time. It does not appear that plaintiff will require nursing services on account of his injuries in the immediate future. But, one must balance against these factors the facts that plaintiff was so very young when he was injured, that no one can say just how much compensation is appropriate for his loss of the ability to enjoy certain aspects of life, that he will have medical problems and pain for the rest of his life on account of his injury, and that the mental anguish which he has suffered and will suffer is substantial. The size of the verdict is supported by substantial evidence and it will therefore not be disturbed. It was a matter for the collective wisdom of the jury.

Order Accordingly.

FILE:

/s/ ROBERT P. MURRIAN
United States Magistrate

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC

(Filed October 14, 1987)

No. 86-5588

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID CANSLER,
Plaintiff-Appellee,

v.

GROVE MANUFACTURING CO.,
Defendant-Appellant,

and

FIREMAN'S FUND INSURANCE COMPANY,
Intervenor.

ORDER

BEFORE: ENGEL, KRUPANSKY and GUY, *Circuit Judges*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

PETITIONER'S FEDERAL COURT COMPLAINT

Civil Action No: .....

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

DAVID CANSLER,
Plaintiff,

VS.

GROVE MANUFACTURING, INC.,
Defendant.

COMPLAINT

Now comes David Cansler, hereinafter designated as Plaintiff, and files this his Complaint against Grove Manufacturing, Inc., hereinafter designated Defendant, and would show unto this Honorable Court the following:

1. The Plaintiff is a citizen and resident of the State of Tennessee, County of Greene, residing in Greeneville, Tennessee.

2. The Defendant, Grove Manufacturing, Inc., is believed to be a Pennsylvania company with its principal place of business being located in the State of Pennsylvania, and its registered agent for service of process being the United States Corporation Company, 225 South Fifteenth Street, Philadelphia, Pennsylvania 19102.

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332, as the matter in controversy exceeds the sum of TEN THOUSAND DOL-

LARS ($10,000.00) exclusive of interests and costs, and there is complete diversity of citizenship.

4. Venue is proper in the Eastern District of Tennessee, Northeastern Division.

5. On or about June 7, 1983, the Plaintiff was employed by Greeneville Machinery Erection Company, located at 1122 Forest Street, Greeneville, Tennessee 37743. On June 7, 1983, the Plaintiff had occasion to be involved on a job which included extending the boom of the Grove crane. While extending the boom, the jib had to be secured in place on the crane fastened with pins before the boom could be extended. The necessary pins are hidden from the crane operators view, so he is unable to see if the pins are in place. During the course of completing this job, the Plaintiff walked underneath the crane and the jib fell on him, crushing his body.

6. The Defendant, as designers and manufacturers of the Grove Crane in question, have caused said product to be placed and sold in a defective condition, unreasonably dangerous to the ultimate user or consumer thereof, including the Plaintiff. Said defective condition was present at the time the product left the Defendant's control and was not substantially modified at the time of the accident on June 7, 1983.

7. Said defective design was the ultimate cause of the injuries and damages sustained by the Plaintiff and it is averred that the Defendant is strictly liable to Plaintiff in tort without any showing of negligence.

8. Plaintiff alleges that the Defendant is guilty of breach of express and implied warranties, negligence, and/or is subject to strict liability in tort for the following acts or admissions:

(a) The Defendant placed into the stream of commerce this crane which was not fit for ordinary purposes for which it was to be used.

(b) The Defendant failed to adequately warn the Plaintiff of inherently and unreasonably dangerous condition of said crane.

(c) The Defendant used an unsafe and defective system and components in manufacturing the crane, rendering it inherently dangerous and unsafe for ordinary purposes for which it was to be used.

(d) The Defendant failed to adequately design, test, and inspect said crane, in that said crane was not equipped with proper safety devices to warn the operator when pins were not in place.

(e) The Defendant failed to provide instructions for any uses for which the crane could be safely used.

(f) The Defendant failed to install safety features which were known and used in the industry at the time the crane was manufactured.

(g) The Defendant used inferior component parts in the manufacture of the crane rendering it inherently dangerous and unsafe for the ordinary purposes for which it was to be used.

9. As a direct and approximate result of the defective crane manufactured and sold by the Defendant as herein and above set forth, the Plaintiff sustained serious and disabling injuries to his body as a whole which rendered him a paraplegic. The Plaintiff was hospitalized and received medical care for such injuries. These injuries are permanent in nature and have affected his

ability to work and have completely affected his enjoyment of the pleasures of life.

10. The Plaintiff prays for judgment against the Defendant in the sum of TWO MILLION DOLLARS, ($2,000,000.00), together with the cost and interest of this action.

11. The Plaintiff demands a jury trial in the action of this cause.

DAVID CANSLER
BY: /s/ CHARLES R. TERRY
CHARLES R. TERRY, ATTORNEY

Of Counsel:

CHARLES R. TERRY & ASSOCIATES
918 West First North Street
Morristown, Tennessee 37814

No. Civ .....

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

DAVID CANSLER,
Plaintiff,

vs.

GROVE MANUFACTURING, INC.,
Defendant.

NOTICE

TO: UNITED STATES CORPORATION COMPANY, 225 South Fifteenth Street, Philadelphia, Pennsylvania 19102, who is the designated statutory agent for service of process for the Defendant, GROVE MANUFACTURING, INC.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within twenty (20) days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within twenty (20) days, you (or the party on whose behalf you are being served) may be required

to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within twenty (20) days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint was mailed on May 21, 1984.

/s/ CHARLES R. TERRY
CHARLES R. TERRY, ATTORNEY
May 21, 1984
DATE

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the Summons and of the Complaint in the above-captioned manner at 225 South Fifteenth Street, Philadelphia, Pennsylvania 19102.

U.S. CORPORATION COMPANY
RELATIONSHIP TO ENTITY/AUTHORITY TO RECEIVE SERVICE OF PROCESS
DATE OF SIGNATURE

Supreme Court, U.S.
FILED
FEB 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1253

IN THE

Supreme Court of the United States

October Term, 1987

DAVID CANSLER,
Petitioner,

vs.

GROVE MANUFACTURING COMPANY,
Respondent,

and

FIREMAN'S FUND INSURANCE COMPANY,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

I.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the Sixth Circuit properly determine the District Court erred in denying respondent's motions for a directed verdict and for j.n.o.v. on the basis of petitioner's complete failure to prove the alleged crane defects were the proximate cause of petitioner's personal injuries?

II.

STATEMENT OF CORPORATE AFFILIATION

Grove Manufacturing Company is a division of Kidde, Inc., a privately held corporation owned by Hanson Industries, a corporation.

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No. 87-1253

IN THE

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October Term, 1987

DAVID CANSLER,
Petitioner,

vs.

GROVE MANUFACTURING COMPANY,
Respondent,

and

FIREMAN'S FUND INSURANCE COMPANY,
Intervenor.

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Grove Manufacturing Company ("Grove"), respectfully requests that the Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, published at 826 F.2d 1507 (6th Cir. 1987).

STATEMENT OF THE CASE

The petition arises from the Sixth Circuit's reversal of the District Court's denial of respondent Grove's motions for a directed verdict and for judgment notwithstanding the verdict in a products liability action governed by Tennessee substantive law and tried to a plaintiff's verdict by a jury. The Sixth Circuit reversed the District Court's judgment based on said jury verdict and remanded the case to the District Court for entry of judgment in favor of respondent Grove.

The operative facts giving rise to plaintiff's claim for personal injuries are set forth in the United States Magistrate's memorandum opinion denying respondent Grove's post-trial motion for j.n.o.v., and read as follows:

> This diversity action resulted from an injury plaintiff, David Cansler, received on June 7, 1983, when he suffered an on-the-job injury in Sullivan County, Tennessee. His employer, Greeneville Erection and Excavating Company, had a contract to sandblast a steel structure and was using a 1979 Grove TMS 300LP 35-ton hydraulic truck crane in doing the work. Just before the plaintiff was hurt, he was about six feet from the truck crane and standing under a 32 foot swingaway boom extension which he was helping rig. The boom extension is made so that it can be stowed alongside the boom and then swung 180 degrees and locked in place for use. One might think of the process of erecting the swingaway boom extension as involving the same principle as unfolding a pocket knife which is lying on its side.

> The swingaway boom extension is held in the stowed position by two front support bracket pins or "stowage pins" and a rear latch. When the swingaway boom extension is erected, two other pins are used to attach the boom nose and the swingaway boom extension. After the stowage pins are removed and the rear latch is released, swingaway boom extension is moved 180 degrees to its extended or "rigged" position.
>
> In this case, the swingaway boom extension was not erected properly. Some unknown person removed the stowage pins and released the rear latch before the two pins at the boom nose were installed. This resulted in the swingaway boom extension being unfastened by any pins, and it fell on the plaintiff when it either vibrated loose or the crane operator moved the boom during the process of trying to erect the swingaway boom extension. Its approximate 2,000 pound weight fractured plaintiff's mid-dorsal spine and rendered him a paraplegic.

See Appendix to Petition for Writ at A12, A13.

The procedural course of petitioner's claim is succinctly stated by the Sixth Circuit at pp. A4-A6 to the appendix to petition for writ, and reads as follows:

> Cansler commenced this action against Grove in the United States District Court for the Eastern District of Tennessee on May 24, 1985 seeking recovery under several different products liability theories. On December 10, 1985, Cansler and Grove stipulated to the dismissal of all his claims with prejudice except for his products liability claim anchored in strict liability as embodied in Restatement (Second) of Torts §402A. The parties

thereafter consented to trial by jury before a United States Magistrate, and the trial commenced on February 26, 1986.

At trial, Cansler attempted to demonstrate that the crane was defective or unreasonably dangerous because the warnings concerning the dangers of erecting the boom extension were inadequate to apprise both himself and the crane operator of the nature and extent of the danger involved in erecting the boom extension, and because Grove failed to install safety devices which would have prevented the accident. Cansler testified that he had never read the crane operator's handbook and that it was never made available to him by Greeneville. He did not testify, however, that the "caution" stickers affixed to the crane at each pin location were not clearly visible to him. Furthermore, he testified during his deposition that he was aware, as a matter of common knowledge, that if all pins were removed leaving the extension unsecured, it would fall. He further testified that he did not need to be warned of the danger of the extension falling because he was familiar with the crane and the danger involved in its preparation and operation.

Dr. Leighton Sissom (Sissom), Cansler's expert engineering witness, testified that if all instructions had been followed and all warnings been heeded, the accident would not have occurred. There was no evidence to the contrary. Sissom also testified that there were several "safety devices" available at the time the crane was manufactured which could have prevented the accident. These devices included a mirror situated so the crane operator could view the front support bracket and attach pins from his

position in the cab of the crane, flashing lights or "buzzers" in the cab to warn the crane operator that the pins were not in place, and an "electronic interlock system" which would have prevented the crane from being moved if the pins were not in place. Sissom stated, however, that the best method of preventing accidents such as the one which had occurred in the case at bar was for the crane operator to conduct a visual inspection of the pins before moving the crane or its boom. The crane operator's handbook directs the crane operator to follow this course of conduct.

Grove moved for a directed verdict at the close of Cansler's case-in-chief and again at the close of all the evidence. Both motions were denied. The jury returned a verdict in favor of Cansler and awarded him $1,000,000 plus his stipulated medical expenses, for a total award of $1,065,879.14. Thereafter, Grove moved for judgment notwithstanding the verdict, for a new trial, and for remittitur of the jury's damage award, all of which motions were denied by the magistrate. Grove then commenced this timely appeal arguing principally that the district court erred in denying its motions for a directed verdict and for j.n.o.v.

REASONS FOR DENYING THE WRIT

I. The Decision of the Sixth Circuit Does Not Conflict With Either Decisions of Other Federal Courts of Appeals or of the Supreme Court of Tennessee.

This case presented the Sixth Circuit with but yet another chance to apply the longstanding standard of review for an appellate court's review of a trial court's consideration of motions for directed verdict and for j.n.o.v. The very case cited by petitioner as creating a purported conflict in authorities is the same case cited and relied upon by the Sixth Circuit in setting forth this standard and formulating its analysis thereunder.[1]

> On a motion for judgment n.o.v. as on a motion for a directed verdict, the District Court must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury. The determination is one of law to be made in the first instance by the District Court. The standard for measuring the legal sufficiency of the evidence is the same both on a motion for a directed verdict and on a motion for judgment n.o.v. Furthermore, the standard remains the same when the trial court's decision is reviewed on appeal. *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975)

See Appendix to Petition for Writ at p. A6.

Contrary to petitioner's argument, the foregoing standard expressly recognizes that both the trial judge and the court of appeals have an independent duty to reconsider the legal sufficiency of the evidence on every

---

1. "The Court in *O'Neill v. Kildejian*, 511 F.2d 511, 513 (6th Cir. 1975) has summarized Tennessee standards in regard to directed verdicts as follows: . . ." *See* Petition at p. 7.

material point when faced with a motion for directed verdict or j.n.o.v. It is only when there is legally sufficient evidence to raise a material issue of fact that the petitioner's Seventh Amendment right to trial by jury comes into play. And in the case *sub judice*, the Sixth Circuit expressly found as a matter of law that there was insufficient evidence on proximate causation between the alleged crane defects and petitioner's injuries to allow this case to go to a jury.

Initially, this case simply involves the Sixth Circuit's application of the foregoing legal standard of review to the particular facts of this case. Nothing will be gained in terms of future guidance to other federal appellate courts by this Honorable Supreme Court's review of this case. To the contrary, further review by this Court will only result in yet another review of the same facts which have been specifically considered by the Sixth Circuit on original hearing and on petition for rehearing.

The Sixth Circuit expressly stated in its opinion that said Court carefully considered the evidence of record and found "that reasonable minds could not have concluded that the alleged unreasonably dangerous or defective conditions of the Grove crane were the proximate cause of Cansler's injuries". *See* Petition for Writ at pp. A8, A9. Proximate causation between an alleged defective or unreasonably dangerous product due to inadequate design, i.e. lack of safety devices, and/or inadequate warnings and the plaintiff's injuries, must be proven under Tennessee products liability law. *See Ricker v. Zinser Textilmaschinen, Gmbh.*, 506 F. Supp. 3 5 (E.D. Tenn. 1978, *affirm'd* 633 F.2d 218); *Wyatt v. Winnebago, Indus.*, 566 S.W.2d 276, 280 (Tenn. App. 1977). In the case *sub judice*, plaintiff simply failed to

introduce legally sufficient evidence that the alleged defects in the Grove crane proximately caused his injuries.

Petitioner argues the Sixth Circuit somehow overlooked or disregarded the testimony of his engineering expert Professor Leighton Sissom that the subject crane "was devoid of a number of possible safety devices that could have prevented this from happening." *See* Petition for Writ at p. 8. Respondent Grove quoted this very testimony from plaintiff's expert to the Sixth Circuit in its brief on appeal.[2] This same expert testimony appears in the very opinion of the Sixth Circuit. *See* Petition for Writ at p. A5. And, this same testimony was again specifically brought to the Sixth Circuit's attention in petitioner's petition for rehearing. Therefore, this evidence was obviously considered and found legally insufficient by said court of appeals.

The legal insufficiency of Expert Sissom's testimony is borne out by several cases applying Tennessee products liability law, which were cited to the Sixth Circuit in Grove's ~~brief~~ on appeal. In *Orfield v. International Harvester Co.*, 535 F.2d 959, 960 (6th Cir. 1976) the plaintiff's expert testified the product at issue was defective or unreasonably dangerous due to a design defect, i.e. failure to have a safety device, which safety device "*would have completely prevented plaintiff's injury.*" (emphasis ours). In *Jackson v. Tenn. Val. Authority*, 413 F. Supp. 1050 (M.D. Tenn. 1976, *affirm'd* 595 F.2d 1120) the court found no causation between

2. "Concerning the causation issue, the only testimony given by Professor Sissom which even attempts to address causation was his opinion that the Grove crane "was devoid of a number of possible safety devices that *could have* prevented this from happening" Leighton Sissom at TR Vol. I 183 (*See* Grove's Brief on Appeal at p. 23).

alleged violations of Tennessee statutes requiring screens over skylights and plaintiff's falling injuries where plaintiff *failed to show that placement of screens over or under skylights would have succeeded in preventing his fall* (emphasis ours). And finally, in *Ellis v. H.S. Finke, Inc.*, 278 F.2d 54 (6th Cir. 1960) a directed verdict for the defendant manufacturer was upheld on appeal because "the evidence does not disclose any causal connection between the falling of the platform and the failure to install the new safety device". 278 F.2d at 55, 56. From the foregoing it readily appears why Expert Sissom's "could have" testimony was found by the Sixth Circuit to constitute legally insufficient evidence on proximate causation to allow this case to go to the jury. That evidence would only have permitted the jury to "speculate" on whether or not plaintiff's accident would have indeed been prevented by the presence of these additional safety devices. And, a jury cannot render its verdict on the basis of speculation, surmise, or conjecture. *See Gold v. Nat'l Sav. Bank of City of Albany*, 641 F.2d 430, 435 (6th Cir. 1981) *cert. denied* 102 S. Ct. 116.

In addition to inadequate design, petitioner's remaining strict liability theory of recovery against respondent Grove was based on alleged inadequate warnings. Again, petitioner takes issue with the following language from the Sixth Circuit's opinion:[3]

> Sissom, Cansler's expert engineering witness, testified that had Grove's instructions been followed and warnings been heeded, the boom extension

3. "This quote clearly shows Dr. Sissom did not state that had the instructions been followed the accident would have been prevented, but rather that the instructions themselves were inadequate." *See* Petition for Writ at pp. 9, 10.

> could not have fallen and Cansler would not, therefore, have suffered an injury. (Court's Opinion, p. 8) *See* Petition for Writ at p. A9.

Interestingly enough, the trial judge, Magistrate Robert P. Murrian, made the exact name evidentiary observation in his memorandum opinion denying Grove's post-trial motions.[4] In fact, every single trial witness, both lay and expert, who testified on the liability issue stated this accident would never had occurred if the instructions and warnings given by Grove for the subject crane had been followed by petitioner and his co-workers.

Furthermore, concerning the lack of proximate causation between alleged inadequate warnings and instructions to the petitioner himself and his injuries, the petitioner admitted he was aware of the danger at issue and did not need to be warned.

> Q. Just because you had worked around this crane for two or three months, or a little over a month up there at Holston Defense, you know from working around it, and just plain common sense, that if that jib is, if all the pins are taken out of it and it's sitting up there on side of that crane, that it's going to fall off?
>
> A. It might fall, yes, sir.
>
> Q. So you really didn't need anybody to warn you of that, did you?
>
> A. No. I guess not.

(Davis Cansler at TR Vol. I 147, 148).

4. "Dr. Leighton E. Sissom, the plaintiff's engineering expert witness, testified on cross-examination that he had 'no problem' with the instructions that were given and that if they had been followed, the accident would not have occurred. There was no evidence to the contrary." *See* Petition for Writ at p. A17.

Finally, petitioner, in part, based his liability theories on the supposition that somehow this accident might have been prevented through a change in the conduct of the crane operator himself. However, petitioner failed to call the crane operator as a witness to testify as to how any additional warnings, instructions and/or safety devices would have altered his conduct and prevented this accident. Such failure again amounted to a lack of material evidence on proximate causation. Therefore, under Tennessee law, respondent submits the action taken by the Sixth Circuit in this cause was entirely proper.

II. The Sixth Circuit Has Not So Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision.

By its very nature, this alleged ground for review implies, and so states, that the Sixth Circuit has stepped far outside the proper realm of its judicial review in deciding this case. Petitioner cites this ground and makes a conclusory statement without any supporting facts or authority. As stated earlier, a close review of the Sixth Circuit's opinion discloses said court made a very careful review of the evidence of record in this cause applying the long established review standard for motion j.n.o.v. and directed verdict. Petitioner simply disagrees with the Sixth Circuit's conclusion concerning the legal insufficiency of his proximate cause evidence. Such a disagreement over the legal significance of the facts of this case should not call for the exercise of this Court's power of supervision.

CONCLUSION

There is no conflict between the Sixth Circuit's decision in this case and other appellate decisions, either federal or state. This Court's power of supervision should not be exercised to review the Sixth Circuit's application of longstanding Tennessee and federal review standards for motions for directed verdict and for j.n.o.v. Accordingly, there is no basis for granting Cansler's petition.

Respectfully submitted,

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February 22, 1988